DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

Milk in the Central Marketing Area; November 14-15, 2001 Hearing on Proposals to Amend Certain Provisions of Tentative Marketing Agreements and Orders	)))))))	Docket No.: AO-313-A44; DA-01-07

BRIEF IN SUPPORT OF PROPOSAL NUMBER 8 SUBMITTED BY PROPONENTS OF PROPOSAL 8

INTRODUCTION

This Brief and Proposed Findings of Fact and Conclusions of Law are submitted on behalf of Proponents of Proposal number 8[1] in an effort to prevent continued disorderly marketing conditions in the Central order – the double pooling of milk on both the Central Federal Milk Marketing Order and a marketwide equalization pool maintained by a state government. The existence and magnitude of the double pooling problem is simply not in genuine dispute. The impact on the Central milk pool is also undisputed. The loss of producer income to those serving fluid milk handlers in the Central order is large and growing. The inability of several fluid milk handlers to attract milk for fluid use is unchallenged, even as the milk pool is diluted.

[1] The Notice of Hearing, Exhibit 1, lists the Proponents as: Anderson-Erickson Dairy Company, Associated Milk Producers, Inc., Family Dairies USA, First District Association, Foremost Farms, Swiss Valley Dairy, Milwaukee Cooperative Milk Producers, Manitowac Milk Producers Cooperative, and Mid-West Dairymen's Company. In addition, Suiza Foods Corporation (now Dean Foods Company) testified in favor of Proposal 8 and joins with the other proponents on this Brief. The Proponents of Proposal 8 are filing separate Briefs as to other hearing proposals.

Proponents of revised Proposal 8 rely on a simple and straight forward proposition, that the same milk may be pooled on only one federal or state marketwide pool. The hyperbole of the opponents to Proposal 8 is unpersuasive. The double dipping benefits are too great, and the practice is too new and suddenly way too large, to permit a theoretical, but impractical, limitation on double pooling to California so-called non-quota milk. The double dipping practice is too similar to practices long prohibited between or among federal milk marketing orders to permit reliance on the "we cannot control" state government "excuse." And federal milk marketing orders have for far too long explicitly defined the marketwide pool maintained by California in ways entirely consistent with Proposal 8. The simple and straightforward proposal 8 should be adopted.

Moreover, emergency conditions in the Central Order mandate quick and decisive action by the Department herein. When approximately $1.9 million over seven months in 2001 is being siphoned off for milk which is simultaneously earning money from the California marketwide pool, and when several large Class I handlers complain of difficulties obtaining milk supplies in the Central Order, disorderly marketing conditions plainly exist. These conditions warrant immediate action by the Secretary in the form of adoption of Proposal 8.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to 5 U.S.C. § 557(c), proponents request that the Secretary make the following Findings of Fact and Conclusions of Law:

Factual Background

As a result of federal regulation of milk, much of the milk produced in the United States today is produced and sold to processors or manufacturers of milk (called handlers) who pay regulated minimum prices based upon the end use to which they put the milk they purchase. The proceeds for these milk sales are then shared among all participating dairy farmers through a system of uniform prices calculated and enforced through federal milk order pools. Participation in federal milk order pricing and pooling is based upon rules developed over 65 years of federal regulation in order to assure an adequate supply of milk for fluid use and to assure uniform treatment of participants. 7 U.S.C. § 608c(5). Not surprisingly, industry participants studiously use the system for their economic advantage (proponents are not complaining of this fact). When one or more players discover a mechanism which provides them an unexpected and unfair advantage, USDA can and should step in to modify the rules to again assure fairness and uniform treatment.

The problem before the Department was succinctly laid out in the testimony of the proponents, especially Neil Gulden. Ex. 23. Under federal milk marketing orders the same milk may share in the proceeds of only one federal order and is not permitted to share in the proceeds of another order on the same milk. Tr. 541. Federal milk marketing orders did not always have such a provision; rather, in the 1960's and 1970's as milk moved longer distances and as federal milk orders more readily abutted one another, such provisions became necessary in order to prevent the double pooling of milk on federal orders. *See e.g.* 7 C.F.R. Part 1068, Section 1068.11 (Revised as of January 1, 1973) and Decision on Proposed Amendments to Marketing Agreements and to Orders, Milk in Minneapolis-St. Paul and Southeastern Minnesota-Northern

Iowa (Dairyland Marketing Areas), 37 Fed. Reg. 3536-4535 (February 17, 1972) (official notice requested).

It is indeed logical, and no participant objected, that the federal milk order program should prevent pooling of the same milk on more than one federal milk order. Absent such a provision, the so-called "paper pooling" of milk would be taken to the logical extreme, and handlers, whether cooperative or proprietary, would choose to pool as much, if not all, of their milk on multiple milk orders, drawing proceeds from as many federal orders as possible. Such a process would defeat the federal order system and would create as between and among handlers and producers disorderly marketing conditions in the form of unequal payments by and to all industry players. Multiple pooling of the same milk thus would make a mockery of the very system that permits such activities.

However, not all milk produced in the United States is marketed by handlers regulated by federal milk marketing orders. The program is a voluntary one for producers subject to certain rules concerning the handlers to whom producers sell their milk. Producers can opt in or out of the federal milk market order program by choosing whether to ship to regulated handlers. In some cases, such regulation takes the form of minimum classified prices that are not pooled among all producers (*e.g.* an individual handler pool as maintained in non-federally regulated portions of Pennsylvania). In some cases, a region and/or a state captures a Class I value, over and above the federal order price and shares that Class I value region or statewide (*e.g.* Northeast Compact and Maine). And in some cases, the state maintains a full blown milk classification and pricing system and a marketwide pool for all participating milk (*e.g.* California and Montana). As discussed in greater detail below, the Department has long since recognized in the regulatory regime the existence and implication of the California milk classification and pricing

and marketwide pooling system. Therefore, opponents of proposal 8 are unjustified in claiming that USDA should not recognize the existence of that system in this proceeding.

To the knowledge of Proponents, little, if any, of the same milk, subject to a marketwide pool maintained by a state government was pooled on any federal milk order prior to the implementation of federal milk order reform. Proponents acknowledge the fact that a significant change in federal orders adopting a price surface for every county in the continental United States created the incentive to pool milk both on the Central federal and the California milk orders. Before federal order reform, the Central order price applied to milk diverted to a plant in Orland, California was indeed significantly lower than the price applied to such milk delivered to a Sioux Falls, S.D. plant. And following federal order reform, that price is now virtually identical (using a $1.70 Class I differential vs. a $1.6267 average location value for California milk based upon Ex. 6, Answer to English Question 4). This is no different from incentives that grew up in the 1960's in the federal order system. The solution then was to prevent double pooling on federal orders of the same milk. That is what Proponents propose now. Moreover, given the length of time its takes to adjust federal Class I differentials and the involvement of Congress in that process, it is not practical to attempt to resolve the double pooling problem through such a complicated and convoluted process as amending Part 1000.[2]

The Department should first determine that an overwhelming percentage of the California produced milk pooled on Order 32 is also pooled in California. Upon receipt of the Upper Midwest hearing testimony of the California Department of Food and Agriculture ("CDFA") (Ex. 22), there cannot be any serious dispute that California maintains a marketwide pool in which **all** milk, both quota and non-quota participates. *See also* Exhibit 21. Moreover, USDA

[2] The recent growth of large multi-regional or national cooperatives likely has also contributed to the opportunity for double pooling.

has long defined California's system as being: "marketwide pooling of returns under a milk classification and pricing program that is imposed under authority of a State government." 7 C.F.R. § 1076(c). The market administrator's witness acknowledged the fact that after a single delivery of California milk to an Order 32 plant that there is not enough freight (value) to make the deliveries from California to Order 32 on a regular basis. Tr. 64. That led the market administrator witness to conclude that it is a safe assumption that by September 2001 "almost all that milk now listed as being pooled on Order 32 as California source milk is being diverted to California plants." Tr. 64-65. In such event, California produced milk delivered to California plants is pooled by California authorities. Exs. 21 and 22. This discredits any attempt to suggest that California milk pooled on Order 30 was not also pooled in California.[3]

The CDFA witnesses (Exhibit 22) and Exhibit 21, explaining the California system, put the matter to rest. Almost all milk produced in California is pooled on the California milk order. The only exceptions are milk shipped direct from the ranch to a non-California plant (accounted for in Exhibit 21, Tab D, Table 4B) and perhaps as much as 1,000,000 pounds per month of specialty cheese milk. The total quantity of such milk was less than one-third the amount pooled on the Central Order in August, 2001 (Ex. 5, Table 11), even leaving aside California milk more logically physically received in Arizona, Hawaii, Nevada and Oregon and the quantity of California source milk also pooled on the Upper Midwest order. The cold, hard truth, undeniable and in fact undenied by anyone in the hearing is that **virtually all, if not all,** California milk pooled on Order 32 is also pooled on the California milk order.

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[3] The DFA witness concurred with the market administrator witness that regular delivery of California milk to the Central Order does not make any economic sense. Tr. 189-190 and Ex. 9, Table 10. Such deliveries are thus unlikely to have occurred meaning that the milk was and is diverted back to plants in California and thus included in California's marketwide equalization pool.

The idea that California does not really operate a marketwide equalization pool or that non-quota milk does not share in the Class 1 market in California is absurd. CDFA testified to the contrary. Ex. 22. Moreover, and quite simply overwhelming in its application herein, is USDA's own acceptance of California as maintaining such a system as shown in 7 C.F.R. § 1076(c).

Moreover, USDA has itself long since recognized and determined in formal rulemaking that California operates a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State. That decision was the result of a federal order rule making hearing found in the old Great Basin Order and now in Part 1000. Official Notice requested of Great Basin Decision, 52 Fed. Reg. 27372 et seq. (July 21, 1987) and 53 Fed. Reg. 4589 et seq. (February 17, 1988); (selected portions attached as Attachment I hereto with sections highlighted):

> **An IMPA [Intermountain Milk Producers Association] witness testified** that some of the options currently available to determine the pool obligations of all partially regulated distributing plant operators are inappropriate for determining **the obligations of such handlers that are regulated under a State order providing for marketwide pooling.** According to the witness, approximately 20 percent of the fluid milk distributed with the current Lake Mead marketing area is distributed from plants located in southern California. **He stated that these handlers are regulated under the California State Pooling Plan.** Under the State Plan, he said, regulated handlers are required to pay for the milk they use, according to the class in which it is used, primarily on the basis of the butterfat and solids-not-fat contained in the milk. **The value of all of the milk received by each California handler is pooled on a marketwide basis and then redistributed to producers on the basis of the individual producer's production of quota and base.** . . .
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> 52 Fed. Reg. 27372 at 27396 (July 21, 1987).
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> • • •
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> §1139.76 Payments by a handler operating a partially regulated distributing plant.
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(b) Each handler who operates a partially regulated distributing plant **which is subject to marketwide pooling of returns under a milk classification and pricing program that is imposed under the authority of a state government** shall pay on or before the 25th day after the end of the month to the market administrator for the producer-settlement fund an amount computed as follows;

• • •

(3) Determine the value of the remaining pounds according to the Class I – Class III price difference applicable at the location of the partially regulated distributing plant (but not to be less than zero), the skim price and the butterfat price, as determined under this Part, **and subtract the amount the handler pays under the state program, based on the classification and the appropriate class prices therefore of the products disposed of in the marketing area.**

It is abundantly clear that IMPA and USDA, in responding to the concerns raised by IMPA, have previously concluded that California's milk pricing and pooling program can be accounted for and considered in creating and enforcing federal milk order provisions. 52 Fed. Reg. at 27397-27398. Proponents of Proposal 8 are thus not creating a new definition or new administrative burdens.

Double Pooling Creates Disorderly Marketing

The receipt of funds from both Order 32 and the California pool is inequitable and violates the central thesis that producers share uniformly in the pool proceeds. Tr. 542-543 and 552-553. It also violates the principle that handlers pay uniform prices. It simply doesn't matter what happened to the money that resulted from double pooling. The money was available to those market suppliers (producers and cooperatives) who double dipped and not to those who could or did not double dip, therefore creating a lack of uniformity, a primary element of disorderly marketing.

While USDA has historically downplayed over order prices paid in comparing uniform payments to producers, this double dipping is not the same thing as an over order price, it is the

result of a regulatory loophole permitting the same milk to share in two government regulatory pools. While California's pool is not a federal order pool, it, by CDFA's testimony, functions in much the same way. Moreover, in adopting 7 C.F.R. § 1076(c) and enforcing that provision against California handlers selling into Order 131, USDA has acknowledged both California's system and how it prices and pools milk.

Turning to the handler side of the equation, assume that one handler double dips and another does not. The handler that double dips has received a financial windfall from the two pools that is not available to other handlers supplying milk for instance to, Prairie Farms (which not coincidentally testified about the need to attract milk to its operations Tr. 329-330). Thus, two handlers similarly situated are **NOT** making uniform payments for milk. Taken literally, for every pound of Class III milk double pooled by a handler, the handler effectively paid that net amount less on its Class III milk than its Class III competitors. Alternatively, if the money was used for supplying Class I milk, the net cost to the handler and its Class I buyer was that double dip amount less than to Prairie Farms. Either way, handlers are not making uniform payments for milk.

While the question of where the double dip money went is interesting in the academic sense (and perhaps to the industry in trying to understand where non-uniform distributions and payments come to rest), the answer remains the same – it is irrelevant and nonetheless disorderly marketing. Tr. 552-553. Again, as a Class III handler, the hander on that volume of milk which received benefits from both the California and federal order pools had a net cost less than any other Class III handler (other than another double dipper). Payments for this milk are nevertheless non-uniform as a result of regulation of which USDA is and must be aware.

In addition to the simple, but tremendous, problem resulting from the 1 to 2 cents per cwt removed each month from the Central order pool during 2001 as a result of double dipping, the aforementioned non-uniform results are a classic, if dramatic loss of federal order dollars. The Secretary cannot ignore the $1.92 million over 7 months that was paid out as a result of a regulatory loophole.

Proposal 8 Should be Adopted

The problem is large and troublesome, but the solution is not difficult. Proposal 8 seeks to address the problem at the root – preventing double pooling of the same milk while still permitting single pooling if that milk performs (contrary to the unsubstantiated assertions of an opponent of Proposal 8). Simply put, diverted milk (treated as pool milk on Order 32) shall be denied that definition if that milk subject to minimum pricing provisions of another federal order or a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government.

Contrary to the assertions of opponents, proponents do not seek to exclude milk from the Order 32 pool even if it performs. Proponents intend and wrote the proposal to mean exactly the opposite. Instead, milk that is diverted can be diverted subject to existing diversion limitations **unless** that same milk also draws from another marketwide equalization pool, federal or state. Milk from that jurisdiction, or any other jurisdiction, may perform and participate in the Central order pool; it just cannot draw from another pool as well. Moreover, milk that is delivered to a Central Order pool plant may participate in the Central Order pool, if it is otherwise eligible. The fact that such milk is produced in a state maintaining a system of marketwide pooling is irrelevant.

Proponents of Proposal 8 do not attempt to create a rule that is different in application based upon geography. It is irrelevant as to the terms of the proposal that the milk at issue is California milk. Milk receiving the benefit of the Montana pool should not be allowed to participate, if as proponents believe, USDA determines that that program is a marketwide equalization pool under a classification and pricing program imposed by Montana. The same milk pooled on another federal order pool should not be diverted milk also on Order 32.

Opponents confuse, deliberately proponents believe, the issue with respect to the so-called out-of-marketing area milk problem. The problem, if there is a problem, with Idaho milk for instance is that for whatever reason, the most economical federal order upon which it may be pooled is the Central Order. But this Idaho milk is not pooled on two different federal orders or on a state order. The situation is not the same, even if the economic impacts are. Idaho milk still must perform and does not draw money twice and thus does not create any of the disorderly marketing conditions discussed above with respect to uniform payments by handlers or to producers. Instead, if there is a problem regarding Idaho milk, it would appear that the problem has to do with order provisions in other orders, order provisions not open for consideration at this hearing.

Indeed at the hearing, the expert witness Mr. Conover testified that the milk diverted back to California plants and included in the California marketwide equalization pool cannot be available as the reserve supply for both the Central order and California. Tr. 556. Therefore, it is illogical to permit diversion of that milk when it simply cannot serve as the reserve supply for two markets simultaneously. This is precisely why federal orders already prohibit double pooling of milk on multiple federal orders. The same philosophy should lead to the same result through adoption of Proposal 8. Finally, the special problems posed by double pooling cannot,

as asserted by some, be resolved through adoption of other pooling provisions. The double pooling barn door cannot and will not be closed by adoption of those other proposals because the special economic benefits afforded by double pooling will always encourage a search for the regulatory means to achieve the result. Only a firmly established outright ban on double pooling can assure the Department and industry that the loophole is permanently closed.

Again, USDA already knows what is a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government. Proponents are not creating a brand new definition that requires new USDA interpretation. Thus, the myriad, and irrelevant, questions regarding hypotheticals can be dispensed with. Moreover, the complaint that California may easily change its system ignores both USDA's earlier decisions to treat specially under 7 C.F.R. § 1076(c) with a similar issue regarding State government programs and the simple fact that as testified to by CDFA witnesses (Exs. 21 and 22) and as established by the California statutes[4] (official notice requested), much of detail of CDFA's system is subject to not-so-easily changed statutes as opposed to regulations (whether or not regulations can be easily changed). The Milk Stabilization Act and the Gonzalves Milk Pooling Act which create the milk classification and pricing system and marketwide equalization pool under State government are both explicit and codified. Classes of milk are codified by statute. Pooling is codified. Quota and non-quota price differences at $1.70 per cwt are

[4] California Statutes and Regulations:

A. Stabilization and Marketing of Market Milk
Deering's California Code, Food and Agricultural Code, Sections 61801-62403, including 2001 Pocket Supplement Issued December 2000

B. Milk Producers Security Trust Fund
Deering's California Code, Food and Agricultural Code, Sections 62501-62667, including 2001 Pocket Supplement Issued December 2000

C. Gonzalves Milk Pooling Act, as amended
Deering's California Code, Food and Agricultural Code, Sections 62701-62756, including 2001 Pocket Supplement Issued December 2000

codified. The resulting fact that non-quota milk shares in all classes of milk is thus at least partially codified by statute.[5]

Proposal 8 also has the advantage of administrative ease. The proposal would simply require a handler pooling milk that could also be pooled on an equalization pool under a milk classification and pricing program imposed under the authority of a State government to make such records available to permit proper audit. Any suggestion that CDFA would not make the records available is absurd. The handler requesting pooling treatment of milk that might also be double pooled is required pursuant to 7 C.F.R. § 1000.27 to make available the required books and records including the records "of any other person" that "are relevant to the obligation of such handler." The handler could be required to waive CDFA confidentiality in order to permit confidential USDA verification. And the refusal by the handler to permit such verification carries a heavy cost – that the milk shall be considered as used in the highest-priced class. Proponents are quite content with this enforcement tool and believe that the market administrator will be left with more than enough power to enforce the policy.

EMERGENCY CONSIDERATION AND DECISION

Proponents have more than demonstrated the emergency need for a rapid decision with implementation promptly. $1.92 million in Central order farmer income has been siphoned off by those double dipping. Numerous handlers testified that the present relative blend prices among federal orders is insufficient to assure that milk will be delivered to their plants. Tr. 225-

[5] Any allegation that when a California plant became federally regulated, Proposal 8 would ban the plant from pooling the California milk is likewise false. Leaving aside the absurdity of a California plant meeting the fully regulated rules of Order 32 (25% fluid milk distribution in the marketing area), if the plant becomes regulated then the milk received by it is not diverted. So Proposal 8 covers this problem by permitting that milk to be pooled in that circumstance.

227, Tr. 323-333, Tr. 385-387 and Tr. 532-535. Is it any wonder that when an additional 1-2 cents per cwt is siphoned off into non-uniform distributions that these handlers may be having trouble obtaining milk? The present system is unfair, inequitable, non-uniform and results in disorderly marketing conditions of the most extreme nature.

CONCLUSION

For the foregoing reasons, Proposal 8 should be adopted on an emergency basis with the Secretary omitting a Recommended Decision and issuing a Proposed Interim Final Rule that can be implemented as soon as possible.

Respectfully submitted,

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BEFORE THE SECRETARY OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

Milk in the Central Marketing Area; November 14-15, 2001 Hearing on Proposals to Amend Certain Pooling and Related Provisions	)	**Docket No.** AO-313-A44; DA-01-07

ATTACHMENT I

Part 1 of 8

52 FR 27372-01

(Cite as: 52 FR 27372)

1987 WL 143415 (F.R.)

PROPOSED RULES

DEPARTMENT OF AGRICULTURE

7 CFR Parts 1136 and 1139

[Docket Nos. AO-309-A27 and AO-374-A11]

Milk in the Great Basin and Lake Mead Marketing Areas; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreements and to Orders

Tuesday, July 21, 1987

*27372

(Cite as: 52 FR 27372, *27372)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This decision recommends a merger of the Great Basin and Lake Mead Federal milk orders, based on industry proposals considered at a public hearing held March 18-20, 1986, in Salt Lake City, Utah. In addition to the presently regulated marketing areas, the proposed merged "Great Basin" marketing area would include the presently unregulated portion of the State of Utah, two counties in Wyoming, and additional counties in Idaho. The provisions of the proposed merged order are generally patterned after those of the two separate orders, and the present Class I price differentials at Salt Lake City and Las Vegas are maintained.

One feature of the proposed merged order not now contained in either order includes, in the pool plant definition, a manufacturing plant located within the marketing area and operated by a cooperative association. The obligation of a partially regulated distributing plant operator regulated by a State order would be determined by subtracting any amount the handler has paid under the State order for the fluid milk products distributed in the Federal order marketing area from the value of those products at the applicable Federal order Class I price.

For the first time in the Federal milk order system, the proposed merged order includes a plan for pricing milk on the basis of its protein, as well as butterfat, components. The differential value of milk used in Class I and Class II would be pooled to determine producers' shares of the higher-valued uses, and the value of protein used in Classes II and III would be pooled with the value of skim milk used in Class I to determine the value of protein in producer milk.

The merger is needed to reflect changes in market structure in that the two separately regulated areas have become, in effect, one common market.

DATE: Comments are due on or before August 20, 1987.

ADDRESS: Comments (four copies) should be filed with the Hearing Clerk, Room 1079, South Building, United States Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Constance M. Brenner, Marketing Specialist, Dairy Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, DC 20250, (202) 447-7311.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12291.
The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small businesses. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action would not have a significant economic impact on a substantial number of small entities.
There are 11 regulated handlers that operate 14 pool plants under the orders that received milk from approximately 700 dairy farmers. A substantial majority of the producers are members of four cooperative associations that are organized into a federation. Most of these entities would be small businesses under the standards specified in 13 CFR Part 121.
The merged and expanded marketing area reflects the sales areas of currently regulated plants. Consequently, the marketing area issue does not involve substantive economic considerations. Changes in pricing within the merged and expanded marketing area would be minor, and should have little economic impact on handlers or producers. Inclusion of a cooperative-owned manufacturing plant located within the marketing area in the pool plant definition would reduce the regulatory burden by not encouraging the cooperative to make excessive, uneconomical shipments of milk to distributing plants.
Adoption of multiple component pricing would change the distribution among handlers of obligations to producers and the pool, and re-distribute payments between producers. However, the changes would affect only one component of the milk received from producers and used by handlers, and would more accurately reflect the value of producer milk priced under the order. The burden of testing and reporting required of handlers for an additional milk component has been minimized as much as possible, while maintaining the integrity of the milk pricing plan. Most of the producer milk used by handlers who would be regulated under the merged order is already subject to protein testing and payments outside the operation of the Federal order. Incorporation of multiple component pricing in the order, therefore, would not increase the regulatory burden for most market participants.
Prior documents in this proceeding:
Notice of Hearing: Issued February 6, 1986; published February 11, 1986 (51 FR 5070).
Suspension Order (Great Basin): Issued May 28, 1986; published June 3, 1986 (51 FR 19821).
Notice of Proposed Suspension (Great Basin): Issued July 29, 1986; published August 4, 1986 (51 FR 27866).
Notice of Proposed Suspension (Lake Mead): Issued July 29, 1986; published August 1, 1986 (51 FR 27555).
Termination of Proceeding on Proposed Suspension (Lake Mead): Issued August 29, 1986; published September 9, 1986 (51 FR 32104).
Suspension Order (Great Basin): Issued September 2, 1986; published September 5, 1986 (51 FR 31759).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreements and the orders regulating the handling of milk in the Great Basin and Lake Mead marketing areas, and of the opportunity to file written exceptions thereto. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601- 674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).
Interested parties may file written exceptions to this decision with the Hearing Clerk, Room 1079, South Building, U.S. Department of Agriculture, Washington, DC 20250, by the 30th day after

publication of this decision in the Federal Register. Four copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).
The proposed amendments set forth below are based on the record of a public hearing held at Salt Lake City, Utah, on March 18-20, 1986, pursuant to a notice of hearing issued February 6, 1986 (51 FR 5070).
The material issues on the record of the hearing relate to:
*27373

(Cite as: 52 FR 27372, *27373)

1. Whether the handling of milk produced for sale in the proposed merged and expanded marketing area is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce in milk or its products;
2. Whether the marketing areas of the Great Basin and Lake Mead orders should be included under one order;
3. Whether the proposed merged marketing area should be expanded to include additional territory;
If a single order is issued for the proposed merged and expanded marketing area, what its provisions should be with respect to:
4. Milk to be priced and pooled;
5. Multiple component pricing;
6. Handler reports;
7. Classification of milk;
8. Class prices, location adjustments and component prices;
9. Handler obligations, the differential pool and the skim milk/protein pool;
10. Payments to producers;
11. Obligations of partially regulated distributing plant operators;
12. Administrative provisions.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:
1. Character of commerce. The handling of milk in the proposed and expanded marketing area is in the current of interstate commerce and directly burdens, obstructs and affects interstate commerce in milk and milk products.
The marketing area specified in the proposed order, hereinafter referred to as the "merged Great Basin marketing area", includes 45 contiguous counties, of which 29 comprise the entire State of Utah. The other counties are located in Idaho (10), Nevada (4), and Wyoming (2). The principal cities in the marketing area are Salt Lake City, Utah, and Las Vegas, Nevada. The specific territory included in the marketing area is set forth in the marketing area discussion.
Handlers located in the present Great Basin area have route sales primarily in Utah and Idaho, with some sales in the Wyoming counties proposed to be included in the merged Great Basin marketing area. Handlers regulated under the Lake Mead order distribute milk in southern Nevada and southern Utah. A number of California fluid milk plants dispose of fluid milk products in Nevada. Similarly, milk procurement for the proposed merged area crosses state boundaries. Handlers regulated by the present Great Basin order procure milk in the States of Utah, Nevada, Idaho, Wyoming and Colorado. The milk needed to supply Lake Mead distributing plants is procured from Nevada, Utah, California, and, at times, Arizona and Idaho.
There are numerous manufacturing plants located within the proposed marketing area that manufacture dairy products. These products are sold in Utah, Nevada, Idaho, Wyoming and other States. Manufactured products produced in many States are offered for sale in Utah, Idaho, Nevada and Wyoming.
2. Need for merger of the orders. Marketing conditions in the two separately regulated marketing areas under consideration justify the issuance of a single order regulating the handling of milk in these areas. This single order would be the most appropriate means of effectuating the declared policy of the Act.
Federal regulation of milk marketing in the Great Basin area was initiated November 1, 1959, when the Great Basin order became effective. The marketing area has since been amended several times to include Elko and White Pine Counties, Nevada; portions of Cache County, Utah, and Uinta County, Wyoming; and the seven Idaho counties currently in the order. The Lake Mead order became fully

effective August 1, 1973. The marketing area covered by the Lake Mead order has not been changed since then.

The merger of the Great Basin and Lake Mead orders was proposed by Intermountain Milk Producers Association (IMPA), a federation of four cooperative associations that market milk in the Great Basin and Lake Mead marketing areas. IMPA represents 75-80 percent of the producers whose milk is pooled under the Great Basin order, and nearly all of the producers included in the Lake Mead pool.

A witness testifying on behalf of IMPA stated that the Lake Mead marketing area is an appendage of the Great Basin market, with handlers regulated by the two orders sharing a common procurement area throughout the State of Utah. He said that the milk surplus to Class I and Class II needs in both markets is absorbed by the same manufacturing plants, located primarily in the Great Basin area. The witness also stated that handlers regulated by the two orders compete for packaged fluid milk sales to consumers, and that fluid milk products packaged in plants regulated by one order are distributed by handlers regulated by the other order. The witness pointed out that most producers in the two marketing areas market their milk through IMPA, a federation of cooperatives active in both markets.

The IMPA representative explained that IMPA assures a market outlet for all of its member producers, and balances reserve and surplus supplies for the Lake Mead and Great Basin markets. He said that IMPA, as a handler under both the Lake Mead and Great Basin orders, furnishes bulk and packaged milk to other handlers and operates the fluid milk distributing plants and manufacturing plants formerly operated by the cooperative associations comprising the federation. The witness stated that the proposed merger would not change the number of fully-regulated handlers, and would cause little change in the cost of milk to handlers or returns to producers. He claimed that additional supplies of milk would not be attracted to the market, although increases in the production of present producers and the conversion of manufacturing-grade producers to Grade A would be accommodated. According to the witness, merger of the orders would not displace present production, discourage market entry by new producers or affect current price alignment between Las Vegas and Salt Lake City handlers or between handlers at those locations and in other marketing areas.

A witness representing Rockview Dairies, Inc., testified in opposition to the proposed merger. Rockview Dairies operates a California distributing plant and two dairy farms which are nonmember producers for Anderson Dairy, the operator of a pool distributing plant under the Lake Mead order. The witness stated that although there appears to be a shared production area for the two orders, he saw little evidence of overlap of sales by handlers regulated under the Lake Mead and Great Basin orders and little movement of dairy products between the two orders. He observed that there would appear to be as much commonality of sales and production areas between the Great Basin and Southwestern Idaho- Eastern Oregon marketing areas, but that no merger of those orders had been proposed. The witness claimed that a merger of the Lake Mead and Great Basin areas would result in lower blend prices paid to Lake Mead producers. He explained that milk pooled under the Lake Mead market is primarily used in Class I, with little Class II use and limited opportunities for disposing of surplus milk, while the Great Basin market uses a much larger percentage of its milk in Class II and Class III products. As a result of a merger, he said, the two nonmember producers

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shipping their milk to Anderson Dairy would have to pool their higher-valued Class I utilization with the much greater quantity of Great Basin milk that is used more predominantly in the lower- valued classes of utilization.

According to the Rockview Dairies representative, Anderson Dairy, the largest distributing plant regulated under the Lake Mead order, recently contracted with a California dairy farm (Rockview) for the farm's total milk supply, and made arrangements with a California nonpool plant to buy any of the farm's production surplus to Anderson's fluid milk needs. The witness predicted that as a result of Anderson's new procurement arrangements, the Lake Mead market would be much less dependent on manufacturing plants located in the Great Basin marketing area for the disposal of milk production surplus to the fluid milk needs of the market.

A brief filed on behalf of Rockview Dairies, Inc., described proponent's proposal to merge the orders as an attempt by IMPA to establish a monopoly in the marketing area and to obstruct interstate commerce. The brief quoted proponent witness as testifying that the merged order proposed by IMPA would allow the milk produced in Clark County, Nevada (Las Vegas area), to be marketed there "rather than making way for some other producers to come into the market to be qualified."

The Rockview Dairies' brief also stated that the record contains no evidence suggesting that the Lake Mead order fails to protect the interests of producers and consumers or to promote the orderly flow of the milk supply to the market, or causes any disruption of the orderly exchange of milk in interstate commerce.

The record indicates that the Lake Mead and Great Basin marketing areas have become interrelated to such an extent that a merger is the most appropriate means of regulating milk marketing in the area involved. When the two orders were promulgated, they regulated the handling of milk in areas that were clearly distinguishable as separate markets for particular handlers and producer groups. Changes in marketing practices and market structure since that time, however, have caused these separately regulated areas to become substantially interrelated in both distribution and supply arrangements. With a single organization, IMPA, marketing the milk of most of the producers supplying milk to the present marketing areas, it is reasonable to expect that the interrelationship of the two areas will become even more pronounced over time.

With the formation of IMPA, cooperatives that formerly marketed the milk of member producers within two separate local markets have combined to market milk and balance milk supplies for the two markets as a whole. The provisions of the present individual orders that involve pooling qualifications do not encourage or promote efficient handling and hauling of milk throughout the area encompassed by the two orders. The proposed merger would assist IMPA in marketing the milk of its members in a more effective and efficient manner without encumbrances exerted on the federation's marketing system by the provisions of the separate orders. At the same time, the merger would have little effect on handlers, consumers and nearly all of the nonmember producers in the merged marketing area.

Proponent cooperative federation operates a fleet of trucks to move member producer milk and directs milk to distributing plants regulated under both orders at the times and in the amounts needed. Under the present provisions of the two Federal orders, the federation must move producers' milk in a manner that will maintain the producer status of its members under either or both orders in order to ensure an adequate reserve supply of milk for both orders. In determining the order under which a producer's milk should be pooled, the federation must consider which plants need milk for fluid and Class II use, which producers' milk is to be included on particular farm pick-up routes, and the need to keep enough dairy farmers qualified as producers on both markets to assure the availability of milk to distributing plants in both markets on short notice. The federation sometimes must shift the market on which a producer's milk is pooled from one Federal order to another because of conditions such as a recent strike of workers at California milk plants. One result of the strike was increased demand for fluid milk in Las Vegas, necessitating the pooling of producers previously associated with the Great Basin market on the Lake Mead market. Another cause of instability in the relative milk supplies of the two markets is the nature of demand in Las Vegas. The number of people in Las Vegas varies widely, increasing significantly over weekends and holidays, and causing large shifts in the demand for fluid milk, both by consumers and by distributing plants.

Adoption of the merger proposal will equalize marketing conditions and prices to producers between the two marketing areas and contribute to greater efficiency by allowing distributing plants to be supplied from the most favorably-located producers without regard to the shipping requirements of two different orders. The distances milk is required to be hauled to qualify for pooling would be shortened, and hauling costs thereby reduced. Accounting and reporting requirements will be reduced if handlers no longer need to be concerned about two separate sets of provisions, two different reporting forms, or the complexities of dealing with the provisions regulating transfers of milk and milk products between orders. The merger would help to reduce unnecessary regulation and reduce costs by relieving the market administrator of duplicating many reports and duties involved in administering two orders instead of one.

It is apparent that, although route disposition from plants regulated under each of the separate orders may not have expanded into the other order area to any great degree, milk supplied by Great Basin producers and bottled in the Great Basin marketing area is increasingly being distributed in the Lake Mead area by Lake Mead handlers. At the same time, it is clear that nearly all of the milk historically associated with the Lake Mead order has become increasingly dependent on distant manufacturing plants in the Great Basin marketing area as outlets for milk produced in excess of the Lake Mead market's fluid milk requirements. If, as the Rockview Dairies' representative testified, the largest distributing plant operator in the Lake Mead market develops an independent supply of milk from California, the need for access to outlets for surplus milk supplies by Lake Mead producers will become even more acute.

Dependence by producers traditionally supplying the Lake Mead market upon the dwindling number of Lake Mead pool distributing plants [FN1] for a pooling base is likely to generate disorderly marketing conditions as producers struggle to assure that their milk will share in the marketwide pool. Data in the hearing record indicate that in May 1985, most of the Class I needs of the Lake Mead market could be met by milk produced in California and Clark County, Nevada. During that month only a small proportion, approximately 13 percent, of the milk produced in Utah *27375

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and pooled on the Lake Mead order was actually needed at Lake Mead distributing plants for Class I use. Testimony by the IMPA witness indicated that under this situation the federation intends to maintain Lake Mead pool status for the Grade A milk of all of its member producers traditionally associated with the Lake Mead market, regardless of whatever excessive hauling costs or complex accounting and reporting procedures may be involved in doing so. The federation's incentive for continuing to assure that its producers are qualified for pooling under the Lake Mead order is the historically higher blend price paid to producers under the Lake Mead order than under the Great Basin order. During the years of 1983-85, the announced blend price paid to Lake Mead producers exceeded the Great Basin blend price by an average of approximately 15 cents per hundredweight.

FN1 Official notice is taken of the cessation of bottling operations at the IMPA Cedar City, Utah, plant in August 1986.

With milk supplies from the southern and central Utah production area available to both the Great Basin and Lake Mead marketing areas and comprising a necessary reserve for the Lake Mead market, equilibrium in the prices paid to producers located in that area is necessary to avoid disorderly marketing conditions. Maintenance of the present pooling standards for a separate Lake Mead order would require the federation to incur unnecessary, expensive and inefficient marketing practices in order to maintain the pool status of its milk on the Lake Mead market.

In the absence of a merger, the federation would be able to assure an adequate supply of milk at its Lake Mead distributing plants while maintaining the Lake Mead pool status of as much of its producer milk as possible only by calculating each month the producer milk that would be pooled under the Lake Mead order. Enough milk would have to be associated with the Lake Mead order to be able to meet the plants' fluid milk requirements on the days the plants receive milk without associating so much milk with the order that the amount of milk diverted to manufacturing would exceed the order's diversion limits. Any milk in excess of that qualified for pooling on the Lake Mead market would have to be pooled under the Great Basin order. Under such conditions, the Great Basin pool would be carrying almost the entire seasonal reserve supply of milk for the Lake Mead marketing area. In addition, the federation would be incurring unnecessary trouble and expense for the sole purpose of marketing its members' milk to their greatest benefit.

The quotation of the IMPA witness from the hearing record used in the Rockview Dairies' brief refers to the requirement of the Lake Mead order that one day's production of a producer's milk must be received at a pool distributing plant each month in order for the producer's total production for the month to be pooled. The IMPA witness testified that, in order for milk produced in southern Utah, more than 200 miles from Las Vegas, to be pooled under the Lake Mead order, some of it must be shipped to Las Vegas each month, sometimes displacing milk produced in the Las Vegas area. The witness' statement was not an assertion that milk from other areas should not be marketed in the Las Vegas area, but rather that the provisions of the order should not require milk to be moved into the Las Vegas area solely in order to be pooled, necessitating the removal of locally-produced milk to make room for it. Provisions encouraging such uneconomic and inefficient handling of producer milk and the testimony that such handling has been engaged in are evidence that the Lake Mead order fails to protect the interests of consumers and handlers by failing to promote the orderly flow of the milk supply to the market. Adoption of the proposal to merge the orders does not require a finding that the Lake Mead order causes a disruption of the orderly exchange of milk in interstate commerce, but merely that such exchange would be improved by a merger of the orders.

The federation probably would be able to continue the Lake Mead pool status of some of its producers without merging the orders and without undertaking unnecessary and uneconomic hauling if the present Lake Mead diversion limits were relaxed. Relaxation of those limits would allow more producer milk to be pooled on the Lake Mead market without an increase in actual deliveries to pool distributing plants. However, increased diversion limits would allow more milk to be pooled under the Lake Mead order, causing a decline in Lake Mead prices to producers that would bring them into balance with Great Basin producer prices. [FN2]

FN2 Official notice is taken of the dramatic increase in the volume of milk pooled under the Lake Mead order while diversion limits were suspended during early 1986, and the resulting decline in the uniform prices paid to producers.

For the reasons discussed above, the inevitable result of existing marketing conditions under the two separate orders is the uneconomic and inefficient hauling practices undertaken by the federation to assure the pool status of its members under the Lake Mead order. Any attempt to avoid such practices by relaxing the present Lake Mead pooling standards will have the effect of reducing the uniform price to Lake Mead producers to a point at which it will be in equilibrium with the Great Basin uniform price to producers similarly located. A merger of the two orders is the best means of accomplishing the same ends by assuring that participants in the merged marketing area will have no incentive to conduct their operations in other than the most efficient possible manner. The efficiencies of operation that may be expected to result from a merger of the two orders should, on the whole, benefit milk producers, handlers and consumers in the marketing areas affected.

As argued by the Rockview Dairies representative, the lower Class I utilization percentage in the present Great Basin area, relative to Lake Mead, can be expected to cause some reduction in prices paid to all producers delivering their milk to plants located in the present Lake Mead marketing area when the orders are merged. However, producers in the Lake Mead area would share in the 30-cent higher Class I price effective at locations in most of the present Great Basin marketing area, which would counteract some of the effect of the present Great Basin market's lower Class I use on returns to producers now supplying the Lake Mead market. In 1985, the average uniform price paid to producers whose milk was pooled under the Great Basin order was $12.61. The range in Great Basin uniform prices during 1985 was from $12.07 to $13.74. The average uniform price paid to Lake Mead producers during 1985 was $12.78, with a range of $12.14 to $13.78. The difference in prices paid to producers under the two orders, therefore, represents just over 1 percent of the uniform price under either order.

In view of the marketing conditions discussed above, separate orders for the Great Basin and Lake Mead marketing areas are no longer compatible with the current marketing practices in these regulated areas. The adoption of a single regulation for the combined area would insure more orderly marketing through application of the same regulatory provisions to all handlers and producers associated with the merged order.

The cooperative federation proposed that the order for the merged marketing area follow the format of the present Lake Mead order, as it was issued more recently than the Great Basin order. Proponent pointed out that the *27376

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provisions of the two orders do not differ greatly, and the proposed order includes most of the provisions of the individual orders except for certain modifications considered necessary to adapt the proposed order to the marketing conditions existing in the proposed merged marketing area. The provisions common to both orders, with certain modifications, have been appropriate in achieving the objectives sought by the regulatory plans for both marketing areas. Accordingly, on the basis of the record evidence, it is found and determined that the order provisions common to both orders would be appropriate for achieving orderly marketing conditions in the proposed merged and expanded marketing area. Only the significant modifications or specific provisions that were at issue will be dealt with in the decision. Wherever possible, the section numbers containing specific provisions have been designated to conform with the format of order provisions that was incorporated into 39 other Federal milk orders in 1974. Uniform numbering between orders should facilitate references to specific provisions.

The order adopted herein would continue the use of the part number for the present Lake Mead order, Part 1139, as proposed by the merger proponents. The amended Part 1139, upon issuance, would supersede Part 1136. The merged marketing area should retain the name "Great Basin", proposed by IMPA as being more descriptive of the territory included in the merged marketing area than the name "Lake Mead." The name "Intermountain" for the marketing area, also proposed by IMPA, would be more descriptive of a larger marketing area extending eastward of the boundaries of the proposed merged order.

Although the present two orders would no longer exist upon effectuation of the merged Great Basin order, this merger action is not intended to preclude the completion of those procedures that would otherwise have existed under the separate orders with respect to milk handled prior to the effective date of the merger. Such procedures which would need to be completed after the effective date of the merger include the announcement of certain class prices and butterfat differentials, submission of reports, computation of uniform prices, payment of obligations, and verification procedures. The

provisions of the merged order would apply only to that milk handled after the effective date of the merger.

3. Merged and expanded marketing area. The marketing area of the proposed merged order should include all of the territory in the presently designated marketing areas of the Great Basin and Lake Mead orders. Certain additional territory between and adjacent to the two present marketing areas also should be part of the proposed merged marketing area. The additional territory to be included are the entire Idaho counties of Caribou, Oneida and Power; Lincoln County, Nevada; the Utah counties of Beaver, Garfield, Kane, Piute, Rich, San Juan and Wayne; and Lincoln County, Wyoming. Previously unregulated portions of Cache, Iron and Washington counties, Utah; Uinta County, Wyoming; and Clark County, Nevada, also would be included. All territory within the boundaries of the designated marketing area which is occupied by government (municipal, State or Federal) reservations, installations, institutions or other establishments, likewise should be a part of the marketing area. Where such an establishment is partly within and partly without such territory, the entire establishment should be included in the marketing area.

The merged and expanded marketing area consists of the entire State of Utah, ten southeastern Idaho counties, the four easternmost Nevada counties, and two counties in the southwest corner of Wyoming. The total population of the merged and expanded marketing area, according to the 1980 census, was approximately 2,214,500 people, or about 170,700 more people than the two separate order areas contain. The territory proposed to be added to the merged order, therefore, increases the population of the merged marketing area by less than ten percent over that of the separate marketing areas.

The territory to be added to the merged marketing area was proposed for inclusion by IMPA. Proponent described all of the added territory as adjacent to counties presently regulated, sparsely populated, and primarily dependent upon handlers regulated by the Great Basin and Lake Mead orders for dispositions of fluid milk products. In response to questions, the IMPA witness stated that there is some distribution in some of the proposed area by handlers regulated under the Southwestern Idaho-Eastern Oregon and Western Colorado orders, but that dispositions in those portions of the area by Great Basin handlers predominate. Proponent justified the addition of entire counties and the presently unregulated portions of counties partially included in the present marketing areas by explaining that the use of county boundaries will make it easier for handlers to determine which of their sales of fluid milk products are inside and which are outside the marketing area. Handlers must report sales inside and outside the marketing area so that the market administrator will have a basis for determining whether or not the handlers meet pooling qualification standards.

The IMPA witness testified that no additional handlers would become regulated as a result of including the proposed additional territory in the merged marketing area. However, in response to questioning, the witness conceded that a manufacturing plant located at Thayne, Wyoming, and operated by IMPA would be included as a pool plant under the pool plant definition of the proposed order. In addition, he said, several producer-handlers would be included in the marketing area because of the inclusion of additional territory. It is expected that these producer-handlers would be exempt from the pooling and pricing provisions of the proposed order.

In view of the fact that there was no opposition to the addition of the proposed territory to the marketing area or contradiction of proponent's characterization of the proposed territory as supplied with fluid milk products primarily by handlers currently regulated under the two existing orders, the marketing area of the merged orders should be defined as proposed.

4. Milk to be priced and pooled. It is necessary to designate clearly what milk and which persons would be subject to the merged order. This is accomplished by providing definitions to describe the persons, plants and milk to which the applicable provisions of the order relate.

The following definitions included in the proposed order will serve to identify the specific types of milk and milk products to be subject to regulation and the persons and facilities involved with the handling of such milk and milk products. Definitions relating to handling and facilities are "route disposition," "distributing plant," "supply plant," "pool plant" and "nonpool plant". Definitions of persons include "producer," "handler," "producer-handler," "cooperative association," and "federation." Definitions relating to milk and milk products include "producer milk," "other source milk," "fluid milk product," "fluid cream product" and "filled milk". Some of these definitions were of particular issue at the hearing or are substantially different than those presently contained in either the Great Basin or Lake Mead orders. Such definitions are discussed below.

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was no opposition to the proposed payment schedule at the hearing. However, in some cases it may be impossible for handlers to pay cooperative associations the full value of their receipts of the cooperative's member milk before the handler has had an opportunity to receive equalization payments from the producer-settlement fund. Because of the potential difficulties in making payments according to the proposed schedule, and because proponents did not explain the differences between their proposal and the payment dates in the present Great Basin order, the merged order should adopt the payment dates specified in the present Great Basin order.

Proponents included in the proposed merged order the present Great Basin rate of partial payment to producers for their milk deliveries during the first 15 days of the month of 1.2 times the previous month's Class III price. However, the witness representing Safeway Stores, Inc., proposed that the rate of partial payment be reduced to the level of the previous month's Class III price, as it is in most other Federal orders in the region, including the present Lake Mead order. In support of his proposal the witness testified that in 1961, when the higher partial payment rate was adopted, it resulted in prices lower than either the uniform price or the Class I price at the time. He stated that as the Class III price has increased, the partial payment rate has exceeded the uniform price and the Class I price. The witness said that the partial payment price has been as much as $1.66 over the uniform price and $.60 over the Class I price in recent years. He asserted that a partial payment should represent only a portion of the total amount due for the first 15 days' deliveries of milk, and certainly should not exceed the amount due for such milk. He argued that the proposed partial payment rate constitutes an overpayment for milk delivered during the first 15 days of the month, and should be reduced to the level of the previous month's Class III price.

A witness for IMPA testified that by the time producers are paid for milk delivered during the first 15 days of the month, they have already delivered 29 days' milk production without receiving any payment at all for the milk delivered. He characterized the present payment schedule as requiring a substantial extension of credit and credit risk which dairy farmers can ill afford. The witness stated that the partial payment provides cash to producers, enabling them to pay their bills and reducing the amount of credit they otherwise would be required to extend to handlers. He testified that farmers today are in a tight cash position, and should not be faced with reduced payments for the milk they have delivered. The witness admitted that a dairy farmer who ceased milk deliveries during the second half of the month could be overpaid for his total production if the partial payment for his first 15 days' milk deliveries is determined by the rate proposed by merger proponents. Proponent witness stated that he would not be opposed to allowing authorized deductions to be made from partial payments to producers.

The partial payment rate under the order applies only to milk delivered by producers during the first 15 days of the month. It seems clear that payments made for deliveries of milk during the period should not exceed the greatest possible pool value that might accrue to such deliveries. On the other hand, producers under the order usually have delivered nearly an entire month's production before receiving any payment for any of it. This problem could be addressed by requiring partial payments to producers to be made earlier, or by requiring partial payments to be made twice during the month rather than once. In any case, neither of those alternatives was proposed or discussed in any testimony. Accordingly, the partial payment rate determined by multiplying the previous month's Class III price by 1.2 should be adopted, but should never be allowed to exceed the level of the current month's Class I price.

Partial payments at the rate adopted should not be required in the case of producers who ship milk for only a small part of the second half of the month. Given the present relationship of the uniform price and the partial payment rate, such producers would very likely be paid more for their first 15 days' delivery of milk than their entire production for the month is worth. For this reason, partial payments would be required to be made only to producers who continue to ship milk through the 17th day of the month. In addition, overpayments to producers on a partial payment basis can be avoided more easily if deductions deemed proper by the market administrator and authorized by producers are allowed to be made from producers' partial payments. Such a provision would help to assure that producer payments are more evenly spaced throughout the month, and that the deductions to be made from a producer's final payment would not exceed the total amount due to the producer for his milk production during the second half of the month.

11. Obligations of partially regulated distributing plant operators. Two options for computing the obligation to the pool of the operator of a partially regulated distributing plant that is also regulated under a State order that provides for marketwide pooling of producer returns should be eliminated. Under the provisions adopted herein, such a handler may settle his obligation only by paying the amount that the Federal order Class I value of the fluid milk products that such plant distributes in

the merged Great Basin marketing area (less Class I receipts from pool sources) exceeds the value of the milk at the applicable State order prices. Partially regulated distributing plant operators who are not regulated under a State order that provides for marketwide pooling would continue to have the same options under which their obligations to the pool are currently computed.
Under the present provisions of the Lake Mead order, every partially regulated distributing plant operator has three options that may be used in settlement of its pool obligations:
(a) The plant operator incurs no payment obligation if the operator purchases from any Federal milk order source an amount of milk classified and priced as Class I milk that is equivalent to such operator's fluid milk sales in the marketing area. Such purchases, however, may not be used to offset any obligation under another Federal order.
(b) The plant operator incurs no obligation under the order, except for an administrative assessment charge on the volume of fluid milk products disposed of in the marketing area, if the operator's payments to dairy farmers and to the producer-settlement fund of any Federal order are not less than the pool obligation that such operator would have incurred if such plant had been fully regulated under the order. Under this option, which is commonly referred to as the "Wichita" option, a plant operator whose payments for milk are *27397

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less than the order's obligations may pay the difference either to its own dairy farmers or to the producer-settlement fund.
(c) The plant operator may choose to pay to the producer-settlement fund the difference between the Class I price and the producer blend price of the order [both prices adjusted for the location of the plant] on all fluid milk products distributed in the marketing area [less any purchases of milk classified and priced as Class I milk under any Federal order].
In addition, a partially regulated distributing plant operator regulated under a State order has a fourth option under which his pool obligation may be determined:
(d) The plant operator may choose to pay to the producer-settlement fund the difference between the Class I price applicable at the location of the plant and the applicable price for the fluid milk products distributed in the marketing area as determined under the State program.
The present Great Basin order contains only options (a), (b) and (c) for determining obligations of partially regulated distributing plants. Those options will be sufficient for determining the pool obligations of such plants not regulated under a State order. For determining the obligations of such plants that are State-regulated, options (a) and (d) will be sufficient.
An IMPA witness testified that some of the options currently available to determine the pool obligations of all partially regulated distributing plant operators are inappropriate for determining the obligations of such handlers that are regulated under a State order providing for marketwide pooling. According to the witness, approximately 20 percent of the fluid milk distributed within the current Lake Mead marketing area is distributed from plants located in southern California. He stated that these handlers are regulated under the California State Pooling Plan. Under the State Plan, he said, regulated handlers are required to pay for the milk they use, according to the class in which it is used, primarily on the basis of the butterfat and solids-not-fat contained in the milk. The value of all the milk received by each California handler is pooled on a marketwide basis and then redistributed to producers on the basis of the individual producer's production quota and base. As a consequence, the payments received by dairy farmers supplying individual plants have no direct relationship to the uses made of their milk by the handlers receiving it, or to the amounts paid into the pool by the receiving handlers.
The witness stated that the payment option currently available only to California State-regulated handlers, which prices sales in the marketing area at the difference between the State order and Federal order prices, is a precise method of determining the exact cost difference of the products. According to the witness, the other payment options available to partially regulated distributing plant operators have no validity in comparing the cost of the products under the State and Federal orders. The witness' position was that the costs attributed to the handler in payment options (b) and (c) above do not accurately represent the actual cost of the milk used by a California- regulated handler in the fluid products distributed within the Federal marketing area. He explained that under California regulation, the price paid by handlers for milk used in fluid products is publicly announced and strictly enforced. He stated further that the milk pooling plan operated by the State of California differs so greatly from the provisions of the Federal order that the values which must be computed under options (b) and (c) above are extremely difficult to determine for California-regulated handlers. Therefore, he concluded, only the present payment option that takes into account the actual prices paid by California handlers for milk used in fluid products should be used

to determine the payment obligations of such handlers. Although California handlers would be the only ones affected by the proposed provision under present marketing conditions, the witness stated that the payment provision would apply to any partially regulated distributing plant operators regulated under any State order that provides for marketwide pooling.

The representative of Safeway Stores, Inc., a company operating multiple distributing plants, one of which is a large distributing plant in southern California with fluid milk sales in the Lake Mead marketing area, testified that the company would prefer to retain in the order all of the payment options currently available to the operator of a partially regulated distributing plant. The witness also proposed changing the language of the provisions governing the obligation of a partially regulated distributing plant operator regulated by a State order. The proposed modification would determine such an obligation on the basis of the difference in value of the fluid milk products distributed in the marketing area under the State and Federal order prices, rather than multiplying the pounds of such disposition by the difference between the applicable prices. The post-hearing brief filed on behalf of the handler expressed the opinion that the importance of retaining the present payment options of a partially regulated distributing plant operator is not as great as the handler considered it to be at the hearing.

The proponents' position with regard to partially regulated distributing plant obligations was supported by a witness representing a Great Basin pool distributing plant that had not yet begun operating at the time of the hearing. The witness supported the proposal in the interest of assuring that all handlers distributing fluid milk products in the marketing area have uniform costs for milk that is used in similar products.

Federal milk orders contain provisions that establish payment obligations of handlers who distribute fluid milk products within the marketing area, but not to an extent great enough to meet pooling standards. These obligations are imposed for the purpose of assuring that all handlers who distribute significant amounts of fluid milk products in the marketing area are subject to comparable costs for such milk. Payment obligations that would result in a cost of milk to a partially regulated distributing plant operator greater than that which would be imposed on a regulated handler would amount to a trade barrier. However, there is no indication that computing a partially regulated distributing plant operator's obligation to the pool on the basis of the difference between the values of the handler's milk under the Federal and State milk orders would be considered inequitable or a barrier to trade. Such a handler would be paying no more for milk distributed within the marketing area than the fully regulated handlers with whom the State-regulated handler is competing. At the same time, fully regulated handlers would be assured that the partially regulated handler has not obtained a competitive advantage by virtue of paying less than they are required to pay for milk used in fluid products.

Proponent witness' testimony in the hearing record is contradictory regarding proponents' intention as to whether the obligation of a partially regulated distributing plant operator should be determined on the basis of the difference in price between the Federal and State orders, or the difference in the values of the fluid milk products concerned as determined by the Federal and State orders. Most of the language in the section of the proposed merged order that deals with obligations of partially regulated distributing plant operators is identical to that in the ***27398***

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present separate orders. However, proponents have modified the language of the present Lake Mead order relating to such handlers that are State-regulated. The modification changes the determination of such a handler's obligation from the Class I price difference under the Federal and State orders to the difference between the value of the milk used in products disposed of in the marketing area at the Federal order Class I price, adjusted for location, and the amount paid for the milk by the handler under the State program. It seems apparent that if proponents wished to use the same method of determining the obligation of a partially regulated distributing plant operator as is currently in use under the Lake Mead order, their proposed order language would have continued to follow the present language of the Lake Mead order. Therefore, there is reason to conclude that proponent intended the State-regulated handler's actual cost of milk to be the amount compared to the Federal order value in computing the handler's pool obligation.

One of the principal points proponent witness made to justify using only the Federal-State value difference to compute partially regulated handler obligations, rather than allowing such handlers a choice of payment plans, was that the precise cost to the handler of the milk distributed in the marketing area by handlers regulated under a State order is known. Payments owed by California-regulated handlers for milk used in fluid products are determined by the amount of nonfat solids and butterfat contained in the milk, plus an added value for the volume of "fluid carrier" in which those

components are contained.
For informational and comparison purposes, the State of California publishes a Class I price. This price, however, is not the basis of determining what any handler actually pays for milk used in fluid products. The published California Class I price is, rather, a reflection of the value of one hundred pounds of fluid milk containing a standard amount of butterfat and nonfat solids. As such, it should not be used to determine what a California- regulated handler has already paid for milk used in fluid products.
The value of milk pooled under the California State order is likely to be affected by the addition of nonfat solids for which the handler must pay. Although proponent witness indicated that proponent does not wish the addition of nonfat solids to be included in the value considered to have been paid by the handler under the State order, such fortification does, indeed, add to the handler's cost of milk. It would be inequitable to exclude the cost of fortification from the value to be credited against the Federal order value of milk distributed in the marketing area by a State-regulated handler. The value to be attributed to nonfat solids added to fluid milk products should be determined by the applicable State-announced prices.
There should be no difficulty in establishing the Federal order value of fluid milk products distributed in the marketing area by a state-regulated handler. The same prices per hundredweight of product pounds and skim milk, adjusted for location, that are used to determine the value of producer milk used in Class I should be used. In addition, the value of butterfat in such products can be determined by multiplying the pounds of butterfat by the butterfat price to be paid producers. If the actual values of the milk under the two pooling systems are compared, any obligation of a partially regulated distributing plant operator to the pool will have been determined equitably. Therefore, the difference in value of the in-area dispositions under the Federal and State pricing systems should be used to compute the pool obligations of partially regulated handlers, rather than the difference between the appropriate Federal and State order prices.
12. Administrative provisions--administrative assessment. The maximum rate of payments by handlers for the cost of administering the merged order should be 4 cents per hundredweight. Such payments are required if the market administrator is to perform the necessary function of administering the merged order. The 4-cent per hundredweight rate is the same as under the two separate orders, and was proposed at the hearing without objection. Continuation of the 4-cent rate should enable the market administrator to administer the merged order effectively. If experience indicates that the merged order can be administered at a lesser rate, the order provides that the Secretary may adjust the rate downward without the necessity of a hearing.
Deduction for marketing services. The maximum rate of deduction from payments to nonmember producers for the cost of providing marketing services such as butterfat and protein testing and market information should be 6 cents per hundredweight. The marketing service deduction is necessary to reimburse the market administrator for providing such services to producers for whom the services are not provided by a cooperative association.
Currently, the maximum rates under the separate orders are 6 cents under the Great Basin order and 7 cents under the Lake Mead order. A 6-cent rate, which was proposed at the hearing without objection, should enable the market administrator to provide adequate testing and information services to nonmember producers. The marketing service deduction rate, like the administrative assessment, may be adjusted downward if the maximum rate is higher than necessary.
Because operation of the merged order would require that all producers' milk be tested for protein content, the market administrator would be authorized to establish, as well as verify, producer tests. Although not proposed, such a provision is necessary because it is apparent from the hearing record that not all of the handlers of producer milk in the merged order area are equipped to test for protein content.
Merger of the administrative expense, marketing service, and producer- settlement funds. To accomplish the merger of the two orders effectively and equitably, the reserves in the administrative expense funds that have accumulated under the individual orders should be combined. Similar procedures should be followed with respect to the marketing service and producer- settlement fund reserves of the individual orders. Any liabilities of such funds under the individual orders should be paid from the appropriate new funds established under the merged order. Similarly, obligations that are due the several funds under the individual orders should be paid to the appropriate combined fund under the merged order.
The money paid to the administrative expense fund is each handler's proportionate share of the cost of administering the order. It is anticipated that all handlers currently regulated under the two orders will continue to be regulated under the merged order. In view of this, it would be an

unnecessary administrative and financial burden to allocate back to handlers the reserve funds under the individual orders and then accumulate an adequate reserve for the merged order. It is equally equitable and more efficient to combine the administrative monies accumulated under the individual orders and to pay any liabilities against such funds from the consolidated fund of the merged order.
The money accumulated in the marketing service funds of the individual orders is that which has been paid by producers for whom the market *27399

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administrator is performing services. The producers who have contributed to the marketing service fund of each order are expected to continue to supply milk for the merged Great Basin market. The consolidation of the reserves in the individual marketing service funds is therefore appropriate in view of the continuation of the marketing service program for these producers under the merged order.
The producer-settlement fund balances in the two orders should be combined so that the producer-settlement fund under the merged order may be continued without interruption. The producers currently supplying the individual markets are expected to continue to supply milk for the merged Great Basin market. Thus, monies now in the producer-settlement funds of the individual orders would be reflected in the uniform prices of the producers who will benefit from the merged order. The combined fund would also serve as a contingency fund from which money would be available to meet obligations [resulting from audit adjustments and otherwise] accruing under one or the other of the separate funds.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of each of the aforesaid orders and of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.
(a) The tentative marketing agreement, the Great Basin order which amends and merges the present Great Basin and Lake Mead orders, and sll of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;
(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds and other economic conditions which affect market supply and demand for milk in the Great Basin marketing area and the minimum prices specified in the tentative marketing agreement and the merged Great Basin order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest;
(c) The tentative marketing agreement and the merged Great Basin order will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in marketing agreements upon which a hearing has been held;
(d) All milk and milk products handled by handlers as defined in the tentative marketing agreement and the merged Great Basin order are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products; and
(e) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require the payment by each handler, as his pro rata share of such expense, 4 cents per hundredweight or such lesser amount as the Secretary may prescribe with the respect to milk specified in § 1139.85 of the tentative marketing agreement and the merged Great Basin order.

Recommended Marketing Agreement and Order Amending the Orders
The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the merged Great Basin order. The following order regulating the handling of milk in the Great Basin marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Parts 1136 and 1139

Milk marketing orders, Milk, Dairy products.
In Title 7 of the Code of Federal Regulations, it is proposed that Part 1136 be removed, and that Part 1139 be revised to read as follows:

PART 1136--[REMOVED]

PART 1139--MILK IN THE GREAT BASIN MARKETING AREA

Subpart--Order Regulating Handling

General Provisions

1139.1 General provisions.

Definitions

1139.2 Great Basin marketing area.
1139.3 Route disposition.
1139.4 [Reserved].
1139.5 Distributing plant.
1139.6 Supply plant.
1139.7 Pool plant.
1139.8 Nonpool plant.
1139.9 Handler.
1139.10 Producer-handler.
1139.11 Approved milk.
1139.12 Producer.
1139.13 Producer milk.
1139.14 Other source milk.
1139.15 Fluid milk product.
1139.16 Fluid cream product.
1139.17 Filled milk.
1139.18 Cooperative association.
1139.19 Product prices.
1139.20 Federation.

Handler Reports

1139.30 Reports of receipts and utilization.
1139.31 Payroll reports.
1139.32 Other reports.

Classification of Milk

1139.40 Classes of utilization.
1139.41 Shrinkage.
1139.42 Classification of transfers and diversions.
1139.43 General accounting and classification rules.
1139.44 Classification of producer milk.
1139.45 Market administrator's reports and announcements concerning classification.

Class and Component Prices

1139.50 Class prices and component prices.
1139.51 Basic formula prices.
1139.52 Plant location adjustments for handlers.
1139.53 Announcement of class and component prices.
1139.54 Equivalent price.

Differential Pool and Handler Obligations

1139.60 Computation of handler's obligations to pool.
1139.61 Computation of weighted average differential price.
1139.62 Computation of skim milk/protein price.
1139.63 Uniform price and handlers' obligations for producer milk.
1139.64 Announcement of weighted average differential price, skim milk/protein price, and uniform price.

Payments for Milk

1139.70 Producer-settlement fund.
1139.71 Payments to the producer-settlement fund.
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1139.72 Payments from the producer-settlement fund.
1139.73 Value of producer milk.
1139.74 Payments to producers and to cooperative associations.
1139.75 Plant location adjustments for producers and on nonpool milk.
1139.76 Payments by a handler operating a partially regulated distributing plant.
1139.77 Adjustment of accounts.
1139.78 Charges on overdue accounts.

Administrative Assessment and Marketing Service Deduction

1139.85 Assessment for order administration.
1139.86 Deduction for marketing services.

Authority: Secs. 1-19, 48 Stat. 31, as amended (7 U.S.C. 601-674).

Subpart--Order Regulating Handling

General Provisions

§ 1139.1 General provisions.

The terms, definitions, and provisions in Part 1000 of this chapter are hereby incorporated by reference, and made a part of this order.

Definitions

§ 1139.2 Great Basin marketing area.

"Great Basin marketing area" (hereinafter called the "marketing area") means all the territory, including all municipalities and government reservations and installations within, or partially within, the counties listed below:
Utah Counties:
All
Nevada Counties:
Clark, Elko, Lincoln and White Pine
Wyoming Counties:

Lincoln and Uinta
Idaho Counties:
Bannock, Bear Lake, Bingham, Bonneville, Caribou, Franklin, Jefferson, Madison, Oneida and Power

§ 1139.3 Route disposition.

"Route disposition" means any delivery of a fluid milk product from a plant to a retail or wholesale outlet (including any delivery to a distribution point by a vendor, from a plant store, or through a vending machine). The term "route disposition" does not include a delivery to a plant defined in § 1139.7 (a) or (b).

§ 1139.4 [Reserved].

§ 1139.5 Distributing plant.

"Distributing plant" means a plant in which approved fluid milk products or filled milk are processed or packaged, and from which fluid milk products are disposed of on routes in the marketing area during the month.

§ 1139.6 Supply plant.

"Supply plant" means a plant from which approved fluid milk products or filled milk are transferred in bulk form during the month to a pool distributing plant.

§ 1139.7 Pool plant.

"Pool plant" means any plant, except a plant defined in § 1139.8, which meets the standards of one or more of the following paragraphs:
(a) A distributing plant from which not less than:
(1) 50 percent in any month of September through February, 45 percent in any month of March and April, and 40 percent in any month of May through August of the approved fluid milk products, except filled milk, received at such plant (excluding milk received at such plant from other order plants or dairy farms which is classified in Class II or Class III under this order and which is subject to the pricing and pooling provisions of any other order issued pursuant to the Act), are disposed of as route disposition; and
(2) 15 percent of such receipts are disposed of as route disposition in the marketing area during the month.
(3) If a handler operates more than one distributing plant, the combined receipts and fluid milk product dispositions of such plants may be used as the basis for qualifying all of the plants pursuant to paragraph (a)(1) of this section, provided the handler so notifies the market administrator in writing before the last day of the month for which such consolidation is desired.
(b) A distributing plant that meets the following conditions:
(1) The plant is located in the marketing area;
(2) The plant meets the requirements of paragraph (a)(1) of this section; and
(3) The principal activity of such plant is the processing and distribution of aseptically processed and packaged fluid milk products.
(c) A supply plant from which during the month not less than 50 percent of its approved milk receipts from dairy farmers is transferred to a pool distributing plant pursuant to paragraphs (a) or (b) of this section as fluid milk products. Any supply plant that has qualified as a pool plant in each of the immediately preceding months of August through February shall be a pool plant in each of the following months of March through July unless written request for nonpool status for any of such months is filed by the plant operator with the market administrator prior to the first day of the month the request is to be effective. A plant withdrawn from pool supply plant status may not be reinstated for any subsequent month of the March through July period unless it fulfills the transferring requirement of this paragraph for such month.
(d) Any manufacturing plant, or other plant not defined in paragraphs (a), (b) or (c) of this section, located within the marketing area at which milk is received from producers and which is owned and operated by a cooperative association or federation which delivers at least 45 percent of its producer milk (including that in fluid milk products transferred from its own plant pursuant to this paragraph

that is not in excess of the amount in producer milk actually received at such plant) to pool distributing plants during the current month or the 12-month period ending with the current month.
(e) The pool plant performance standards in paragraphs (a)(1), (b), (c) or (d) of this section may be reduced or increased by 10 percentage points by the Director of the Dairy Division if that person finds such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such a finding, the Director shall investigate the need for revision either at the Director's own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, the Director shall issue a notice stating that the revision is being considered and invite data, views, and arguments.

§ 1139.8 Nonpool plant.

"Nonpool plant" means any plant defined in this section, and any other milk receiving, manufacturing, or processing plant, other than a pool plant:
(a) "Producer-handler plant" means a plant operated by a producer-handler as defined in this, or any other order issued pursuant to the Act.

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(b) "Other order plant" means a plant as specified under paragraph (b)(1), (2) or (3) of this section that is fully subject to the pricing and pooling provisions of another order issued pursuant the to Act:
(1) A distributing plant qualified pursuant to § 1139.7(a) that also meets the pool plant requirements of another Federal order, and from which the Secretary determines a greater quantity of Class I milk was disposed of as route disposition during the month in such other Federal order marketing area than was disposed of as route disposition in this marketing area, except that if such plant was subject to *27401*

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all the provisions of this order in the immediately preceding month, it shall continue to be subject to all the provisions of this order until the third consecutive month in which a greater proportion of its Class I route disposition is made in such other marketing area;
(2) A supply plant qualified pursuant to § 1139.7(c) that also meets the pool plant requirements of another Federal order and from which a larger quantity of fluid milk products is transferred during the month to plants regulated under such other order than is transferred to distributing plants under this order, except that transfers to other order plants for Class III dispositions during the months of March through July shall be disregarded for purposes of this computation if the operator of the supply plant elects to retain pool status under this order; or
(3) A plant qualified pursuant to § 1139.7 (a), (b), or (c) which the Secretary determines, despite the provisions of this order, to be fully regulated under another Federal order.
(c) "Exempt plant" means a distributing plant:
(1) Having less than an average of one thousand pounds per day of route dispositions in the marketing area during the month;
(2) Operated by a governmental agency, or a duly accredited college or university, disposing of fluid milk products only through the operation of its own food service, and having no route dispositions in commercial channels; or
(3) From which the total route disposition is to individuals or institutions for charitable purposes without remuneration from such individuals or institutions.
(d) "Partially regulated distributing plant" means a distributing plant that does not qualify as a pool plant and is not an other order plant, a producer- handler plant, or an exempt distributing plant.
(e) "Unregulated supply plant" means a supply plant that does not qualify as a pool plant and is not an other order plant, a producer-handler plant, or an exempt distributing plant.

§ 1139.9 Handler.

"Handler" means:
(a) Any person who operates one or more pool plants;
(b) Any cooperative association with respect to producer milk diverted for the account of such association pursuant to § 1139.13;
(c) Any cooperative association or federation with respect to milk that is received at the farm for delivery to a pool plant of another handler in a tank truck owned and operated by, or under the control of, such cooperative association or federation; or
(d) Any person who operates a plant defined in § 1139.8 (a) through (e).

§ 1139.10 Producer-handler.

"Producer-handler" means any person who meets all of the following conditions:
(a) Operates a dairy farm(s) from which the milk produced thereon is supplied to a plant operated by

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such cooperative association in its capacity as a handler defined in § 1139.9(c), or from a pool plant operated by such association as follows:
(1) On or before the 2nd day prior to the last day of each month for milk received during the first 15 days of the month an amount per hundredweight computed pursuant to the provisions of § 1139.73 (a); and
(2) On or before the 15th day of the following month for milk received during the month at not less than the value computed for such milk in accordance with the provisions under § 1139.73(b), less the amounts of payments made to such cooperative association pursuant to paragraph (e)(1) of this section, and less the amount retained by handlers as authorized deductions.

§ 1139.75 Plant location adjustments for producers and on nonpool milk.

(a) In making payments computed pursuant to § 1139.72, the market administrator shall reduce the weighted average differential price computed pursuant to § 1139.61 by the location or zone differential applicable at the plant where such milk was first received from producers.
(b) The weighted average differential price applicable to other source milk pursuant to § 1139.71(a)(2)(iii) shall be adjusted at the rates set forth in § 1139.52(a) or (b) applicable at the location of the nonpool plant from which the milk was received (but not to be less than zero).

§ 1139.76 Payments by a handler operating a partially regulated distributing plant.

(a) Each handler who operates a partially regulated distributing plant that is not subject to a milk classification and pricing program that provides for marketwide pooling of producer returns and is enforced under the authority of a state government shall pay on or before the 25th day after the end of the month to the market administrator for the producer-settlement fund the amount computed pursuant to paragraph (a)(1) of this section, or, if the handler submits pursuant to §§ 1139.30(b) and 1139.31(b) the information necessary for making the appropriate computations, and so ***27412***

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elects, the amount computed pursuant to paragraph (a)(2) of this section:
(1) An amount computed as follows:
(i) Determine the pounds of route disposition in the marketing area from the partially regulated distributing plant;
(ii) Subtract the pounds of fluid milk products received at the partially regulated distributing plant;
(a) As Class I milk from pool plants and other order plants, except that subtracted under a similar provision of another Federal milk order; and
(b) From another nonpool plant that is not an other order plant to the extent that an equivalent amount of fluid milk products disposed of to such nonpool plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;
(iii) Subtract the pounds of reconstituted skim milk in route disposition in the marketing area from the partially regulated distributing plant;
(iv) Multiply the remaining pounds by the weighted average differential computed pursuant to § 1139.61 as adjusted by the appropriate location or zone differential (but in no case less than 0);
(v) Add the amount obtained from multiplying the pounds of reconstituted skim milk specified in paragraph (a)(1)(iii) of this section by the difference between the Class I price adjusted to the appropriate plant location and the Class III price (but in no case less than 0).
(2) An amount computed as follows:

(i) Determine the value that would have been computed pursuant to § 1139.60 for the partially regulated distributing plant if the plant had been a pool plant, subject to the following modifications:
(a) Fluid milk products and bulk fluid cream products received at the partially regulated distributing plant from a pool plant or an other order plant shall be allocated at the partially regulated distributing plant to the same class in which such products were classified at the fully regulated plant;
(b) Fluid milk products and bulk fluid cream products transferred from the partially regulated distributing plant to a pool plant or an other order plant shall be classified at the partially regulated distributing plant in the class to which allocated at the fully regulated plant. Such transfers shall be allocated to the extent possible to those receipts at the partially regulated distributing plant from pool plants and other order plants that are classified in the corresponding class pursuant to paragraph (a)(2)(i)(a) of this section. Any such transfers remaining after the above allocation which are classified in Class I and for which a value is computed for the handler operating the partially regulated distributing plant pursuant to § 1139.60(e) shall be priced at the uniform price (or at the weighted average price if such is provided) of the respective order regulating the handling of milk at the transferee-plant, with such uniform price (or weighted average price) adjusted to the location of the nonpool plant (but not to be less than the lowest class price of the respective order), except that transfers of reconstituted skim milk in filled milk shall be priced at the lowest class price of the respective order;
(c) If the operator of the partially regulated distributing plant so requests, the value of milk determined pursuant to § 1139.60 for such handler shall include in lieu of the value of other source milk specified in § 1139.60(g) less the value of such other source milk specified in § 1139.71(a)(2)(iii) a value of milk determined pursuant to § 1139.60 for each nonpool plant that is not an other order plant which serves as a supply plant for such partially regulated distributing plant by making shipments to the partially regulated distributing plant during the month equivalent to the requirements of § 1139.7(c) subject to the following conditions:
(1) The operator of the partially regulated distributing plant submits with reports filed for the month pursuant to §§ 1139.30(b) and 1139.31(b) similar reports for each nonpool supply plant;
(2) The operator of such nonpool supply plant maintains books and records showing the utilization of all milk and milk products received at such plant which are made available if requested by the market administrator for verification purposes; and
(3) The value of milk determined pursuant to § 1139.60 for such nonpool supply plant shall be determined in the same manner prescribed for computing the obligation of such partially regulated distributing plant; and
(ii) From the partially regulated distributing plant's value of milk computed pursuant to paragraph (a)(2)(i) of this section, subtract:
(a) The gross payment made by the operator of such partially regulated distributing plant, less the value of the butterfat at the butterfat price specified in § 1139.50(d), for milk received at the plant during the month that would have been producer milk if the plant had been fully regulated;
(b) If paragraph (a)(2)(i)(c) of this section applies, the gross payments by the operator of such nonpool supply plant, less the value of the butterfat at the butterfat price specified in § 1139.50(d), for milk received at the plant during the month that would have been producer milk if the plant had been fully regulated; and
(c) The payments by the operator of the partially regulated distributing plant to the producer-settlement fund of another order under which such plant is also a partially regulated distributing plant, and like payments by the operator of the nonpool supply plant if paragraph (a)(2)(i)(c) of this section applies.
(b) Each handler who operates a partially regulated distributing plant which is subject to marketwide pooling of returns under a milk classification and pricing program that is imposed under the authority of a state government shall pay on or before the 25th day after the end of the month to the market administrator for the producer-settlement fund an amount computed as follows:
(1) Determine the pounds of route disposition in the marketing area from the partially regulated distributing plant;
(2) Subtract the pounds of fluid milk products received at the partially regulated distributing plant;
(i) As Class I milk from pool plants and other plants, except that subtracted under a similar provision under another Federal milk order;
(ii) From another nonpool plant that is not an other order plant to the extent that an equivalent amount of fluid milk products disposed of to such nonpool plants by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any

other payment obligation under any order;
(3) Determine the value of the remaining pounds according to the Class I-Class III price difference applicable at the location of the partially regulated distributing plant (but not to be less than zero), the skim price and the butterfat price, as determined under this Part, and subtract the amount the handler pays under the state program, based on the classification and the appropriate class prices therefore of the products disposed of in the marketing area.

§ 1139.77 Adjustment of accounts.

Whenever audit by the market administrator of any handler's reports, books, records, or accounts or other verification discloses errors resulting in money due a producer, a cooperative association, or the market administrator from such handler or due such handler from the market administrator, the market administrator shall promptly notify such handler of any amount so due, and payment thereof shall be made ***27413***

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on or before the next date for making payments as set forth in the provisions under which such error occurred.

§ 1139.78 Charges on overdue accounts.

(a) Any unpaid balance due from a handler pursuant to §§ 1139.71, 1139.76, 1139.77, 1139.85 and 1139.86, or under this section shall be increased 1% per month on the next day following the due date of such unpaid obligation and any balance remaining unpaid shall likewise be increased on the first day of each month thereafter until paid.
(b) For the purpose of this section, any obligation that was determined at a date later than that prescribed by the order because of a handler's failure to submit a report to the market administrator when due shall be considered to have been payable by the date it would have been due if the report had been filed when due.

Administrative Assessment and Marketing Service Deduction

§ 1139.85 Assessment for order administration.

A pro rata share of the expense of administration of the order shall be paid to the market administrator by each handler on or before the 14th day after the end of the month at the rate of 4 cents per hundredweight, or such lesser amount as the secretary may prescribe, with respect to:
(a) Producer milk (including milk received from a handler defined in § 1139.9(c), but excluding in the case of a cooperative association which is a handler pursuant to § 1139.9(c), milk which was received at the pool plant of another handler) and such handler's own production;
(b) Other source milk allocated to Class I pursuant to § 1139.44(a) (7) and (11) and the corresponding steps of § 1139.44(b), except such other source milk that is excluded from the computations pursuant to § 1139.60 (d) and (g);
(c) Route disposition in the marketing area from a partially regulated distributing plant during the month that exceeds the quantity subtracted pursuant to § 1139.76(a)(1)(ii).

§ 1139.86 Deduction for marketing services.

(a) Except as set forth in paragraph (b) of this section, each handler in making payments to producers for milk pursuant to § 1139.74 (other than milk of the handler's own production) shall deduct 6 cents per hundredweight, or such lesser amount as may be prescribed by the Secretary, and shall pay such deductions to the market administrator on or before the 14th day after the end of the month.
(b) The monies acquired by the market administrator pursuant to paragraph (a) of this section shall be expended by the market administrator to provide market information, and to verify or establish the weights, samples and tests of milk of any producer for whom a cooperative association is not performing the same services on a comparable basis as determined by the Secretary.
Signed at Washington, DC, on: July 14, 1987.

J. Patrick Boyle,